HARVEY A. CLIFTON ET AL.

IBLA 80-149 Decided November 16, 1981

Appeals from decisions of the Colorado State Office, Bureau of Land Management, holding certain lode, placer, and millsite claims to be abandoned and void, rejecting mineral patent application, and refusing to record certificates of location. C MC 2239, etc.

Affirmed in part; reversed in part.

1. Federal Land Policy and Management Act of 1976: Assessment Work -- Federal Land Policy and Management Act of 1976: Recordation of Affidavit of Assessment Work or Notice of Intention to Hold Mining Claim -- Mining Claims: Assessment Work

Sec. 314(a) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744(a) (1976), requires owners of unpatented mining claims located on or before Oct. 21, 1976, to file evidence of assessment work or notice of intention to hold such claims with BLM by Oct. 22, 1979, and by Dec. 30 of each year thereafter, and further provides that a mining claim is conclusively presumed abandoned in the absence of the required filings. The requirement of filing by Dec. 30 of each year "thereafter" is initiated by the first filing with BLM of such evidence or notice of intention. Where the statutory filing requirements have been met, the failure of such an owner to file such documents by Dec. 30, 1978, following recordation of the location certificate

with BLM in 1977, as required by regulation at 43 CFR 3833.2-1(a), is properly treated as a curable deficiency of which the owner is entitled to notice and an opportunity to rectify prior to a decision finding the claim abandoned and void.

Jerry Cupper, 45 IBLA 215 (1980); Willene Minnier, 45 IBLA 1 (1980); Valda Waters, 44 IBLA 272 (1979); Dennis J. Mertz, 43 IBLA 302 (1979); Amanda Mining & Manufacturing Association, 42 IBLA 144 (1979); Clair R. Caldwell, 42 IBLA 139 (1979); and Charles Caress, 41 IBLA 302 (1979), overruled to extent inconsistent.

2. Federal Land Policy and Management Act of 1976: Assessment Work -- Mining Claims: Millsites

The failure of a holder of a millsite claim which has been properly recorded under 43 U.S.C. § 1744(b) (1976) to file an annual notice of intention to hold the millsite is a curable defect and the millsite may not be deemed to have been abandoned absent a failure to comply with a notice of deficiency.

APPEARANCES: Harvey A. Clifton, Lakewood, Colorado, pro se; Robert K. Murray, Esq., Golden, Colorado, for appellant, Stancil V. Couch.

OPINION BY ADMINISTRATIVE JUDGE GRANT

Harvey A. Clifton, Stancil V. Couch, and Lee J. Peterson appeal a decision of the Colorado State Office, Bureau of Land Management (BLM), dated October 29, 1979, holding the Perseverance Lode, Couch Placer, Victoria #2 Lode, and Virginia Side Extension Lode mining claims and the Perseverance Mill Site to be abandoned and void and rejecting the mineral patent application filed by appellant Couch for the Couch Placer and Victoria #2 Lode claims. Couch and the Little Kingdom Metal Mining Company appeal a related decision of the Colorado State Office, BLM, dated November 9, 1979, rejecting for recordation certificates of location for the Couch Placer and Victoria #2 Lode mining claims. 1/

1/ The claims subject to appeal herein have been assigned the following serial numbers by the Colorado State Office:

The Couch Placer mining claim was originally located on August 11, 1960. The Victoria #2 Lode, also owned by appellant Couch, was located on September 18, 1968. The Perseverance Lode mining claim was located on September 9, 1968, by appellant Clifton. All three locations antedate the enactment of section 314 of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1744 (1976). 2/

Pursuant to the provisions of section 314(b) of FLPMA, 43 U.S.C. § 1744(b) (1976), Clifton filed a copy of the official record of the location notice of the Perseverance Lode and Perseverance Mill Site on March 15, 1977. Couch filed similar documents for the Couch Placer and Victoria #2 Lode on May 5, 1977. Section 314(b) of FLPMA, 43 U.S.C. § 1744(b) (1976), requires the owner of an unpatented lode or placer mining claim or millsite located prior to the date of approval of FLPMA (October 21, 1976), to file, within the 3-year period following October 21, 1976, a copy of the official record of the notice or certificate of location of such claim or site. Regulations implementing section 314(b) are found at 43 CFR 3833.1.

The BLM decisions which are the subject of this appeal acknowledge the timeliness of appellants' filing of their notices of location. BLM, however, found the Perseverance Lode, Perseverance Mill Site, Couch

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fn. 1 (continued)

Serial Number	Name of Claim	Date of Recording Certificate of Location With BLM	Party Submitting Claim for Recording	
C MC 2239	Perseverance Mill Site	March 15, 1977	Harvey Clifton	
C MC 2240	Perseverance Lode	March 15, 1977	Harvey Clifton	
C MC 5164	Couch Placer	May 5, 1977	Stancil Couch	
C MC 5165	Victoria #2 Lode	May 5, 1977	Stancil Couch	
C MC 55075	Virginia Side	Certificate not recorded; map recorded October 12, 1978	Lee J. Peterson	Extension Lode
C MC 121239	Victoria #2 Lode	October 11, 1979	Little Kingdom Metal Mining Co.	
C MC 121241	Couch Placer	October 11, 1979	Little Kingdom Metal Mining Co.	

The mineral patent application for the Couch Placer and Victoria #2 Lode claims is serialized as C 25743.

2/ As set forth by appellant Couch, the Couch Placer was relocated on Feb. 15, 1965, Mar. 9, 1965, and Mar. 15, 1977. The Victoria #2 Lode was amended on Mar. 15, 1977. Appellant Clifton amended the location of Perseverance Lode on Feb. 1, 1977, and located the Perseverance Mill Site on Jan. 31, 1977.

Placer, and Victoria #2 Lode claims to be abandoned and void for the failure of appellants to file timely either evidence of the performance of annual assessment work or a notice of intention to hold the claims at issue. This requirement, with respect to mining claims, is found at 43 CFR 3833.2-1(a) which states:

> (a) The owner of an unpatented mining claim located on Federal lands on or before October 21, 1976, shall file in the proper BLM office on or before October 22, 1979, or on or before December 30 of each calendar year following the calendar year of such recording, which ever date is sooner, evidence of annual assessment work performed during the preceding assessment year or a notice of intention to hold the mining claim.

Regarding millsites, the requirement of filing notice of intention to hold a millsite claim by December 30 of each year following recordation of the millsite with BLM is found at 43 CFR 3833.2-1(d).

BLM held that Couch and Clifton had not met the requirements of 43 CFR 3833.2-1(a) because of their failure to file the appropriate documents on or before December 30, 1978. The statutory authority for requiring appellants to meet the December 30, 1978, deadline was attributed by BLM to section 1 of the Mining Law of 1872, as amended, codified at 30 U.S.C. § 22 (1976). 3/

The statutory requirements for filing evidence of assessment work or notice of intention to hold mining claims is set forth as follows in section 314(a) of FLPMA, 43 U.S.C. § 1744(a) (1976):

> Sec. 314. (a) The owner of an unpatented lode or placer mining claim located prior to the date of this Act shall, within the three-year period following the date of approval of this Act and prior to December 31 of each year thereafter, file the instruments required by paragraphs (1) and (2) of this subsection. * * *

3/ This section reads:

"Except as otherwise provided, all valuable mineral deposits in lands belonging to the United States, both surveyed and unsurveyed, shall be free and open to exploration and purchase, and the lands in which they are found to occupation and purchase, by citizens of the United States and those who have declared their intention to become such, under regulations prescribed by law, and according to the local customs or rules of miners in the several mining districts, so far as the same are applicable and not inconsistent with the laws of the United States."

See also 43 CFR 3833.0-3 listing several bases of authority for the regulations in 43 CFR Subpart 3833.

> (1) File for record in the office where the location notice or certificate is recorded either a notice of intention to hold the mining claim (including but not limited to such notices as are provided by law to be filed when there has been a suspension or deferment of annual assessment work), an affidavit of assessment work performed thereon, [or] a detailed report provided by the Act of September 2, 1958 (72 Stat. 1701; 30 U.S.C. 28-1), relating thereto.
>
> (2) File in the office of the Bureau designated by the Secretary a copy of the official record of the instrument filed or recorded pursuant to paragraph (1) of this subsection, including a description of the location of the mining claim sufficient to locate the claimed lands on the ground.

Subsection (a) of the statute quoted above pertains exclusively to the filing of a notice of intention to hold, affidavit of assessment work, or detailed report under the Act of September 2, 1958, 30 U.S.C. § 28-1 (1976), by owners of unpatented lode or placer mining claims. This subsection of the statute requires for such unpatented claims located prior to October 21, 1976, filing of one of the three instruments with both the local recording office (where the notice of location is filed) and the proper BLM office within 3 years after enactment of the statute (by October 22, 1979), and "prior to December 31 of each year thereafter." The act of filing one of these instruments within the 3-year time limit initiates the requirement that one of these documents be filed prior to December 31 of each year "thereafter."

The regulation cited by BLM in support of its decision, on the other hand, requires filing evidence of assessment work or notice of intention to hold in the proper BLM office by October 22, 1979, or by December 30 of each calendar year following the calendar year of "such recording," whichever date is sooner. 43 CFR 3833.2-1(a). The act of "recording" referred to in the regulation is fairly construed to be the act of recording the certificate or notice of location with BLM pursuant to the regulations at 43 CFR 3833.1. Thus, pursuant to the regulation at 43 CFR 3833.2-1(a), notice of intention to hold or evidence of assessment work must be filed with BLM by December 30 of the calendar year following the year in which the certificate of location is filed for record with BLM as the decision appealed from held. The Board itself has adhered to this position in the past. See, e.g., Valda Waters, 44 IBLA 272 (1979); Dennis J. Mertz, 43 IBLA 302 (1979); Amanda Mining & Manufacturing Association, 42 IBLA 144 (1979); Clair R. Caldwell, 42 IBLA 139 (1979).

[1] After extensive consideration, this Board is now convinced that the requirement of filing evidence of assessment work or notice of intention to hold with BLM for claims located on or before October 21,

1976, must be met at some point during the 3-year period following enactment of the recordation statute, 43 U.S.C. § 1744 (1976), i.e., by October 22, 1979, and by December 30 of each year following such initial filing of evidence of assessment work or notice of intention to hold. We do not challenge the authority of BLM, asserted in the decision below to adopt regulations pursuant to the provisions of the Mining Law of 1872, as amended, 30 U.S.C. §§ 22-24, 26-28, 29, 30, 33-35, 37, 39-42 (1976), requiring the owners of unpatented mining claims to file notice of intention to hold or evidence of assessment work with BLM by December 30 of the year following recordation with BLM of the certificate of location. However, we cannot affirm a decision conclusively presuming a claim to be abandoned and thus void in the face of evidence to the contrary where the statutory filing requirements imposed by section 314 of FLPMA have been complied with. This statute imposes a conclusive presumption of abandonment for failure to comply with the filing requirements established therein, notwithstanding evidence showing claimant did not intend to abandon the claim. Lynn Keith, 53 IBLA 192, 196-97, 88 I.D. 369, 372 (1981). With respect to filings that are deficient for failure to conform to the requirements of the regulation, but which meet the statutory requirements of section 314, the deficiency does not give rise to a conclusive presumption of abandonment but rather to a curable defect of which claimant should be given notice and an opportunity to rectify prior to any decision voiding the claim. Heidelberg Silver Mining Co., Inc., 58 IBLA 10, 12 (1981); Ted Dilday, 56 IBLA 337, 341, 88 I.D. 682, (1981); Feldslite Corporation of America, 56 IBLA 78, 81-83, 88 I.D. 643, (1981). This principle was cited as significant by the Tenth Circuit Court of Appeals in a recent decision upholding the validity of the regulations:

> We conclude that the Secretary has not ignored § 1744(c) which assumes that even defective filings put the Secretary on notice of a claim, and we hold that once on notice, the Secretary cannot deem a claim abandoned merely because the supplemental filings required only by § 3833 -- and not by the statute -- are not made. This is also the Secretary's view: failure to file the supplemental information is treated by the Secretary as a curable defect. A claimant who fails to file the supplemental information is notified and given thirty days in which to cure the defect. If the defect is not cured, "the filing will be rejected by an appealable decision." [Footnote omitted.]

Topaz Beryllium Co. v. United States, 649 F.2d 775, 778 (10th Cir. 1981). This is also consistent with the fundamental principle of statutory construction that statutes which impose a forfeiture for noncompliance are construed strictly. See 3 Sutherland, Statutory Construction, §§ 59.02 and .03 (4th ed. 1974).

The record discloses that proof of labor for the 1977 and 1978 assessment years for the Couch Placer and Victoria #2 Lode claims was filed by Stancil Couch with BLM on January 31, 1979, in C MC 5164 and

C MC 5165. Accordingly, it must be concluded that the statutory filing requirements have been met through 1979, and the decision appealed from is reversed to the extent it finds the subject claims to be conclusively presumed abandoned and thus void for failure to file evidence of assessment work by December 30, 1978. Similarly, the decision rejecting appellant's patent application (C 25743) must be reversed as it is predicated on the finding that the claims were conclusively presumed abandoned and void.

With respect to the Perseverance Lode and the Perseverance Mill Site, on October 22, 1979, appellant Clifton filed a single document containing an affidavit of assessment work performed during the period from September 1, 1978, through September 1, 1979, and also a statement of appellant's intention to hold. No other evidence of assessment work or notice of intention to hold appears in the files, nor does there appear the detailed report provided by the Act of September 2, 1958.

The BLM decision of October 29, 1979, held that 43 CFR 3833.2-1(a) required appellant Clifton to file a notice of intention to hold or evidence of annual assessment work on or before December 30 following the calendar year of recordation. As Clifton had recorded his claims on March 15, 1977, BLM applied the regulation to require his filings on or before December 30, 1978. For the reasons discussed above, the decision as to Clifton's Perseverance Lode claim (C MC 2240) must be reversed since the statute only requires filing of evidence of assessment work or notice of intention to hold by October 22, 1979. We note, however, that if appellant Clifton had filed evidence of assessment work or a notice of intention to hold in 1977, he would have been required by statute to file evidence of assessment work or a notice of intent to hold on or before December 30, 1978, since, by statute, the first filing of evidence of assessment work with BLM triggers the subsequent annual filing requirement.

[2] BLM's invalidation of the Perseverance Mill Site was based on a regulation, substantially similar to 43 CFR 3833.2-1(a), which requires the owner of an unpatented millsite to file a notice of intention to hold on or before December 30 of each year following the year of recording. 43 CFR 3833.2-1(d). BLM supported its decision by invoking the provisions of 43 CFR 3833.4, which creates a conclusive presumption of abandonment upon a claimant's failure to comply with 43 CFR 3833.2-1.

The statutory requirement for filing evidence of assessment work or notice of intention to hold mandated by section 314(a) of FLPMA, 43 U.S.C. § 1744(a) (1976), pertains by its terms to owners of an "unpatented lode or placer mining claim." This may be distinguished from the provisions of section 314(b) of FLPMA with respect to recordation of the certificate or notice of location with BLM, which expressly applies to owners of an "unpatented lode or placer mining claim or mill or tunnel site." 43 U.S.C. § 1744(b) (1976). This Board has previously held this distinction to be significant in signalling a statutory intent

to limit the requirement of filing evidence of assessment work or notice of intention to hold to lode or placer mining claims, as opposed to millsites. Feldslite Corporation of America, supra at 80-81, 88 I.D. at . The regulation at 43 CFR 3833.2-1(d) requires the owner of a millsite to file notice of intention to hold the millsite with BLM although the statute which is the authority for finding a conclusive presumption of abandonment in the absence of filing does not contain such a requirement. To the extent the regulatory filing requirement exceeds the statutory filing requirement, the failure to comply timely with the filing requirement is appropriately treated as a curable defect of which the claimant should be given notice and a reasonable opportunity to comply with the regulatory requirement prior to any decision declaring the claim abandoned and void. Feldslite Corporation of America, supra at 82-83, 88 I.D. at ; see Topaz Beryllium Co. v. United States, supra.

With respect to the Virginia Side Extension Lode claim (C MC 55075), Lee J. Peterson filed with BLM on October 12, 1978, a map of the claim and recordation fee together with proof of labor for certain other claims. As the map submitted was apparently an attachment to the location certificate (not submitted to BLM) and the copy of the map showed that it was recorded with the county recorder's office on August 9, 1978, BLM assumed that this claim had been located after October 21, 1976. After requesting of its locator, appellant Peterson, that he furnish a copy of the notice of location of this claim within a time certain, BLM declared this claim abandoned and void upon Peterson's failure to do so. BLM's support for its holding is 43 CFR 3833.1-2(b), if it is correct in its initial assumption that the Virginia Side Extension Lode was located after October 21, 1976. We see no reason to disagree with BLM's analysis of the situation. Even if this claim had been located before October 21, 1976, the Virginia Side Extension Lode would meet the same fate. Our order of June 3, 1980, directed BLM to reexamine its files for a copy of the official record of the notice or certificate of location of the Virginia Side Extension Lode mining claim. BLM could find no such filing. In the absence of evidence to the contrary, we conclude that appellant Peterson did not record the location of this claim on or before October 22, 1979, as required by 43 U.S.C. § 1744 (1976) and 43 CFR 3833.1-2(a). Whether located before or after October 21, 1976, the Virginia Side Extension Lode is properly declared abandoned and void.

BLM's decision of November 9, 1979, is the final subject of inquiry before us. In that decision, BLM rejected certificates of location for the Couch Placer and the Victoria #2 Lode filed by the Little Kingdom Metal Mining Company on October 11, 1979. The ground for rejecting the certificates was that these constituted the identical claims filed by appellant Couch in 1977 which BLM held abandoned and void for failure to file notice of intention to hold or evidence of assessment work by December 30, 1978, and, therefore, the filings with respect to the voided claims were a nullity. It appears that BLM is correct that this is a duplicate filing for the same claims. Since the Board is reversing the decision declaring the Couch Placer and Victoria #2 Lode claims abandoned and void, the decision regarding the claims as filed by Little Kingdom Metal Mining Company must be vacated.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision of October 29, 1979, is affirmed in part and reversed in part, and the decision of November 9, 1979, is vacated.

C. Randall Grant, Jr.
Administrative Judge

We concur:

Bernard V. Parrette
Chief Administrative Judge

Gail M. Frazier
Administrative Judge

Bruce R. Harris
Administrative Judge

Douglas E. Henriques
Administrative Judge

Anne Poindexter Lewis
Administrative Judge

ADMINISTRATIVE JUDGE BURSKI CONCURRING:

It is clear that, at least since the decision in Feldslite Corporation of America, 56 IBLA 78, 88 I.D. 643 (1981), this Board has begun to review the regulations found in 43 CFR 3833, which implement section 314 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744 (1976), with a far more critical eye than was its former practice. See, e.g., Harry J. Pike, 57 IBLA 15 (1981). Indeed, the instant appeal must stand as the sharpest example of this new approach, for herein we must not only reverse a decision of the Bureau of Land Management, but must also overrule a whole line of our own precedents. In part, this change may be ascribed to the crystallizing effect which varied factual situations have had on our perceptions of the purpose and effect of the statute. See Tenneco Oil Co., 36 IBLA 1, 2 (1978). Nor can there be any doubt that Federal court decisions have played an equally large role. Whatever the combination, however, there is no denying that an alteration in the course of recordation adjudication has, to some extent, already occurred.

Since, however, the change has occurred while the Board continues to reiterate its belief both that the recordation statute is self-executing (see Lynn Keith, 53 IBLA 192, 88 I.D. 369 (1981)) and that the Board has no authority to invalidate a duly promulgated regulation (see Garland Coal & Mining Co., 52 IBLA 60, 88 I.D. 24 (1981)), the question must inevitably arise whether it is possible to reconcile all those seemingly disparate concepts into a cohesive whole, or whether the Board is merely following its whim and caprice whenever the impulse arises to do equity. While I agree with many of the sentiments expressed in the dissenting opinion, I would respectfully suggest that there is a conceptual unity to all of the Board's recent decisions.

The starting point in any analysis must be the Tenth Circuit Court of Appeals decision in Topaz Beryllium Co. v. United States, 649 F.2d 775 (1981). In effect, the court suggested that a bifurcated approach was necessary in adjudicating recordation filings: those filings which the statute expressly requires, and for which it provides specified time periods, are mandatory and late compliance may not be waived or excused, while failure to submit those filings which are supplemental, defined by the court as "required only by § 3833 -- and not by the statute," should be treated as a curable defect and a claimant must be granted a 30-day period in which to submit the requested information after due notice.

While most Board decisions have cited the Topaz Beryllium Co. decision as mandating the curable defect approach, this Board had enunciated a similar standard over a year earlier in Robert W. Hansen, 46 IBLA 93 (1980), where we adverted to the preface of the February 1979 amendments to the regulations which differentiated between "the minimum requirements of the law and regulations" and "any additional information that may be desired." Id. at 96-97. In Hansen, we implicitly distinguished those situations in which the statutory language compelled a conclusive presumption from those where the source of the presumption was merely regulatory, suggesting that the latter might be subject to curative action. See also H. L. Smith, 46 IBLA 62 (1980).

Thus, the recent Board decisions flow as much from the Board's independent analysis as they do from the Topaz Beryllium Co. opinion.

Nevertheless, it should be made clear that the Board has never stated that a regulatory requirement need not be followed. Rather, the Board has solely been concerned with the mechanism by which the statutory "conclusive presumption" is triggered. What we have held, and our holdings have been quite limited, is that the statutory presumption arises as the result of either an initial failure to comply with a statutory requirement or a failure to comply after notice with a regulatory requirement. Indeed, the Board has, on occasion, affirmed the decision of BLM requiring the filing of a map after proper notice, a requirement which is purely regulatory. See Walter Everly, 52 IBLA 58 (1981).

Of course, adoption of a bifurcated curable/noncurable approach requires an initial determination of what is a curable defect. In order to ascertain what requirements are mandatory this Board has been forced to examine closely the regulations in light of the statute. Where we could find no statutory replication of a regulatory requirement we have treated a failure to comply with the regulatory requirement as a curable defect. 1/ I think the majority opinion convincingly shows that the provision which, in effect, states that an individual who, in calendar year 1977, files a notice of location with BLM for a pre-FLPMA claim, unaccompanied by proof of assessment work, must file either proof of assessment work or a notice of intention to hold the claim on or prior to December 30, 1978, is not based in the statutory language of section 314 under any fair reading. As the majority points out, statutes which provide for forfeiture of rights, which this statute clearly does, must be strictly construed. Thus, we cannot, consistent with accepted principles of construction, expand the purview of the statute to increase its scope beyond that which its language actually embraces.

The ruling herein is of limited effect. It applies only to (1) pre-FLPMA claims, (2) for which a notice of location was filed in 1977, (3) where the 1977 filings were not accompanied by a proof of labor. Inasmuch as there were no regulations implementing section

1/ The only arguable exception has been the consistent ruling of the Board that all claims filed for recordation must be accompanied by a $5 filing fee. These decisions have not been premised on a view that the statute, itself, requires a filing fee. The statute is, in fact, silent. Rather, these decisions have been premised on the fact that absent submission of the filing fee, there is no recordation. See Edward J. Szynkowski, Jr., 53 IBLA 310 (1981). Moreover, while section 314 of FLPMA is silent as to a filing fee, section 304(a) of FLPMA, 43 U.S.C. § 1734(a) (1976), expressly provides that "notwithstanding any other provision of law, the Secretary may establish reasonable filing and service fees * * *." The $5 service fee was expressly upheld as reasonable in Topaz Beryllium Co. v. United States, 479 F. Supp. 309, 316 (D. Utah 1979), aff'd, 649 F.2d 775 (10th Cir. 1981).

314 until January 27, 1977, it is less than likely that anyone recorded a notice of location in calendar year 1976. See, e.g., Northwest Citizens For Wilderness Mining Co., Inc., 33 IBLA 317 (1978), aff'd, Civ. No. 78-46M (D. Mont. June 19, 1979). On the other hand, if the claim was recorded in 1978, the statute itself would require filing of a proof of assessment work or a notice of intention to hold on or before October 22, 1979.

Moreover, if the filing in 1977 also contained a proof of assessment work, then, under the majority view, a claimant would be required to file a notice of intention to hold or proof of assessment work on or before December 30, 1978. This is so because, under the terms of the statute, the initial filing of assessment work triggers the requirements for subsequent annual filings. I think this is a distinction which cannot be overemphasized because it is here that our traditional deference to regulatory interpretation comes into play.

I have noted in the past my belief that the word "thereafter" in section 314(a) of FLPMA, 43 U.S.C. § 1744(a) (1976), is amenable not only of the interpretation that annual filings must be made each year after the initial assessment work filing, but could alternatively be interpreted as requiring an initial filing of assessment work before October 22, 1979, and an annual filing after October 22, 1979, regardless of when the initial filing was actually made. See James V. Joyce, 42 IBLA 383, 390 (1979) (concurring opinion). As I said in Joyce, while the latter interpretation was my preference, the statutory language was sufficiently ambiguous to support the interpretation codified in the regulations. Since the regulatory interpretation was arguably supportable, we had no right to overturn it. Accordingly, I concurred in the majority's decision in Joyce. I adhere to that view.

It has been the absence of arguable support for certain regulatory provisions that has led this Board to treat certain filing defects as curable in nature. By so doing we affirmed the overall authority of the Department to call for such submissions, requiring only that an opportunity to cure such defects must be provided before the statutory "conclusive presumption of abandonment" would attach. I think that such treatment was not only mandated by the court's decision in Topaz Beryllium Co., supra, but that it was required by our affirmative obligation to apply both the statute and the regulations to appeals brought before us.

I recognize, as Judge Stuebing points out, that the approach of the majority results in certain practical anomalies in recordation adjudication. The recordation provisions, however, are rife with such results. Nothing could be more bizarre than the fact that filing on December 31 of any year is not, because of the statutory language, filing within the calendar year for the purposes of section 314. We are forced, nevertheless, to interpret the law as we find it, not as we might have written it. I believe the decision of the majority does precisely that.

James L. Burski
Administrative Judge

ADMINISTRATIVE JUDGE STUEBING DISSENTING IN PART:

The holding by the majority that where mining claims were recorded with BLM in 1977 there was no necessity to file subsequent evidence of annual labor or notices of intention to hold until October 22, 1979, is so clearly fallacious that I am unable to comprehend how that holding can command majority support. The failure of appellant in this case to file either evidence of work performed or a notice of intention to hold during calendar year 1978, after recording the claims in 1977 with BLM, should lead ineluctably to the statutory consequence that such failure "shall be deemed conclusively to constitute an abandonment of the mining claim[s]," as this Board has so often held in the past.

The consequence of failure to comply is indeed harsh, and virtually every member of this Board has expressed a distaste for the duty of implementing it. However, we have recognized that the conclusive presumption of abandonment which attends the failure to file an instrument when and where required by the statute is imposed by the statute itself, and no one in the executive branch is invested with authority to waive or excuse noncompliance or to afford relief from the statutory consequences. Lynn Keith, 53 IBLA 192, 88 I.D. 369 (1981).

Although admitting that the regulations which implement the statute clearly require that a claimant file with BLM either evidence of assessment work or notice of intention to hold each calendar year following the year of recordation of the notice of location of the claim with BLM, the majority hold that this is not a requirement of the statute, and therefore the appellants' noncompliance is merely a "curable defect" under the dictum expressed in Topaz Beryllium Co. v. United States, 649 F.2d 775, 778 (10th Cir. 1981). I disagree on several grounds.

The interpretation applied by the majority depends on the order in which the subsections of the statute are written. That is, because section 1744(a) deals with filing either notices of intention to hold, affidavits of assessment work, or detailed reports of scientific surveys performed, the majority opines that the requirement to file such instruments "each year thereafter" is keyed to the first filing of one such instrument, rather than to the initial recording with BLM of the location notice, which is not described in the text of the statute until section 1744(b). The majority perceives this as a loophole. 1/

The statute is clear that the recordation of the notice of location must precede (or be made simultaneous with) the filing of one of the other documents described in section 1744(a), as BLM would have no use for, say, a notice of intention to hold a claim of which it had no record. But under the majority's interpretation of the statute, a

1/ A "loophole" is a rifle port or an observation peephole in a fortification, and, for the protection of the defenders, it is made as small as possible. Anything dragged through a loophole is subject to being squeezed, stretched, twisted, and distorted. Loopholes do not admit much light.

number of incongruous situations might arise. For example, suppose the locator of a pre-FLPMA claim sent BLM a copy of his affidavit of assessment work for the previous year in December 1976 without recording the claim with BLM, reasoning that the statute allowed him until October 22, 1979, to record his notice of location. Since the majority holds that it is the first filing of evidence of work or notice of intent that triggers the requirement to make a similar filing "each year thereafter," I presume that the claimant's failure to file evidence of work or notice of intent in 1977 and 1978 would cause the claim to be regarded as abandoned under the majority's view, even though the deadline for recording the claim had not yet been reached.

In a somewhat more plausible example, where the same claimant recorded his location notice and filed evidence of work for the previous year with BLM in December 1976, and filed the followup document in 1977, but not in 1978, we would all agree that the law would require that the claim be "deemed conclusively" abandoned. What is incongruous is that the majority holds that where such a claimant only recorded his notice of location in 1976, and filed nothing whatever in 1977 or 1978, the claim remained in good standing. Thus, the claimant who made the better effort to keep current would lose his claim, while the one who simply recorded and then neglected to do anything for 2 years would have his claim preserved. Surely this is not what the Congress intended.

Although the statute may be susceptible to the interpretation applied by the majority, such an interpretation should not be given effect because, first, it is inherently unreasonable and inconsistent with the legislative and administrative purpose; second, because it is contrary to the interpretation given it by the Department and implemented by duly promulgated regulations; third, because it violates the interpretation established by this Board in at least seven prior cases, and fourth, because it resorts to the dictum from Topaz Beryllium, supra, which is not applicable to this case.

The majority's interpretation is unreasonable and inconsistent with the legislative and administrative purpose because it creates a hiatus which certainly was never intended, and because such hiatal period could only engender uncertainty concerning the claims' status rather than resolve it. The object of the legislation was to provide a mechanism for the elimination of "stale claims" by requiring the claimant to record the claim with BLM and to file "each year thereafter" a document to demonstrate that the claim had not been abandoned. The need for this is described in the legislative history of FLPMA, Senate Publication No. 95-99 at page 130, as follows:

> Although the Committee considered such proposals [to amend the general mining law] to be beyond the scope of S. 507, as ordered reported, the Committee did address a particular procedural problem concerning the registration of mining claims -- a problem which is particularly frustrating to the public land manager. The source of this problem is what is often termed "stale claims". There is no provision in the 1872 Mining Law, as amended, requiring notice

> to the Federal government by a mining claimant of the location of his claim. The mining law only requires compliance with local recording requirements, which usually means simply an entry in the general county land records. Consequently, Federal land managers do not have an easy way of discovering which Federal lands are subject to either valid or invalid mining claim locations. According to some estimates, there are presently more than 6,000,000 unpatented claims on the public lands, excluding national forests, and more than half of the units of the National Forest System are reputedly covered by mining claims. Of course, the vast majority of these claims will never be pursued, and do not directly interfere with land management. They do, however, create significant uncertainty regarding the actual extent of valid locations. [Footnote omitted.]

No benefit can be derived from an interpretation of the statute which would allow a claimant to record the claim with BLM in 1976 and then file nothing for the next 2 consecutive years to indicate his continuing maintenance and interest in the location.

The Department's regulations implementing this statute presumably reflect the agency's interpretation of this statute. The courts are obliged to accord great deference to an agency's interpretation of a statute administered by it. This Board is at least equally obligated to do so.

Finally, I note that the majority reaches its result through its reliance on the obiter dictum expressed in Topaz Beryllium Co. v. United States, supra. However, that language is inapposite here, because it is directed to defective filings which are nonetheless sufficient to put the Secretary on notice despite the claimant's failure to meet some regulatory requirement which is not imposed by statute. 2/ But this is not such a case. There was no such deficient filing. There was no filing whatever.

Edward W. Stuebing
Administrative Judge

2/ Only the failure to submit supplemental data is curable. As explained by the Court:

"[W]e conclude that the Secretary has not ignored § 1744(c) which assumes that even defective filings put the Secretary on notice of a claim, and we hold that once on notice, the Secretary cannot deem a claim abandoned merely because the supplemental filings required only by § 3833 -- and not by the statute -- are not made. This is also the Secretary's view: failure to file the supplemental information is treated by the Secretary as a curable defect. A claimant who fails to file the supplemental information is notified and given thirty days in which to cure the defect. If the defect is not cured, 'the filing will be rejected by an appealable decision.'" (Emphasis by the Court; footnote omitted.)